

Original filed 11/2/06

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SONNY RAY HARDAWAY,)	No. C 02-1463 JF (PR)
)	
Petitioner,)	ORDER DENYING PETITION
)	FOR WRIT OF HABEAS
vs.)	CORPUS
)	
M. YARBOROUGH, Warden,)	
)	
Respondent.)	
_____)	

INTRODUCTION

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1999 convictions in Alameda County Superior Court for a forcible lewd and lascivious act, kidnaping with intent to commit rape and rape by instrument, kidnaping of a child under the age of fourteen, and assault with intent to commit forcible penetration or a lewd act upon a child. For these crimes Petitioner was sentenced to 110 years to life in state prison.

This Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer and memorandum of points and authorities addressing the merits of the petition, and Petitioner filed a traverse. After reviewing the papers and the trial record in its entirety, the Court concludes that Petitioner's claims are without merit and will deny the petition.

BACKGROUND

The California Court of Appeal summarized the underlying facts as follows:

On Monday, January 4, 1999, Jane [Doe] was 11 years old (nearly 12) and lived in an apartment in East Oakland near Arroyo Viejo Park. She decided that morning not to go to school and went to the park. Upon later reentering the park, a man she did not know (defendant) got up, walked past her and blew her a kiss. This scared her, but she walked on to a sandbox, sat and wrote names in the sand with a stick. She wore jeans and a T-shirt, and was four feet, 11 inches tall and weighed 105 or 110 pounds.

As she walked over to get a red stick, she noticed the same man sitting on a bench near the sandbox. He asked: "Have you ever made love? Can I make love to you? You want to be my girlfriend?" She told him no, and he told her at some point his name was Ray and he lived on 88th Avenue. After she told him no, he picked her up and carried her "like a baby," his hands under her buttocks, as she kicked and screamed, across the grass, down a dirt path and across a creek. At one point he cupped a hand over her mouth and told her to be quiet. Her ribs hurt. Defendant set her down on the other side of the creek, still holding one arm, and Jane kept screaming. Defendant was a Black man with a beard and mustache, dressed in black pants, a long-sleeve blue and black checkered shirt over a sleeveless black T-shirt (tank top), and white Adidas shoes with green and black stripes.

Defendant unbuttoned and unzipped Jane's jeans, pulled them down and put his hand on her private part – vagina – over the outside of her underwear, and Jane backed up to avoid this. Defendant then pulled down his own pants and his white boxer shorts with colored dots; he moved his hand up and down on his penis until "it got bigger" and then grabbed Jane's hand by the wrist and tried to make her touch it. She "snatched" her hand away. He pushed her down, bruising the side of her face, and she lay for a time on her back. Next he put his hand inside her underwear and touched her vagina. Jane "moved away," and he touched her breast outside her T-shirt. The assault ended when Jane, then on her knees, saw a "little Mexican boy" walking along the other side of the creek. Defendant got up and ran off, across a bridge and out of the park.

Jane pulled up and zipped her pants, walked back over the creek and path, and walked home, crying. She tearfully reported to a neighbor and then to her mom (foster mother) that a man had tried to rape her in the park. The neighbor called 911, and Officer Scott Wong and a partner responded at 11:50 a.m. Wong interviewed the still-hysterical Jane, broadcast a description of the assailant, and drove Jane around the park. Some five minutes after the broadcast, around 12:08 p.m., Officer Jimmy Wong stopped defendant several blocks away, on 88th Avenue. Jane was driven there and identified him as her assailant. He wore the same clothes and looked the same to her. He was arrested.

Jane identified defendant with certainty in a six-person physical lineup

1 held on January 31st, where he wore different clothes and had shaved his beard.
2 She said he had changed his voice and removed his top front teeth. She identified
3 him again at trial.

4 The People presented testimony from Angela C. of defendant's similar
5 attack on her in 1982, when she was 18, in which he also robbed her of jewelry.

6 Defendant testified. He was impeached with 1982 convictions for the
7 robbery and felony assault on Angela, for an assault on another woman, and for a
8 1988 robbery. His defense was a mixture of alibi and prosecutorial conspiracy.
9 He insisted that he had been set up by police and the prosecution and that Jane had
10 made up her story to disguise her problem of cutting school. He called his sister
11 and niece, who said he lived with them at 88th Avenue and that he did not have
12 false teeth.

13 Defendant's alibi was that he had been at a pawn shop hocking a bracelet
14 when the crimes (supposedly) occurred and that he was arrested a short time later,
15 for no reason.

16 Respondent's Ex. G (Unpublished Opinion of the California Court of Appeal, First Appellate
17 District, People v. Hardaway, Nos. A090842 & A092541, Jul. 24, 2001) at 2-3.

18 Petitioner represented himself at trial and at his motion for a new trial. On appeal he was
19 represented by counsel, but he also filed a pro se petition for writ of habeas corpus. In its opinion
20 affirming the judgment of conviction the state appellate court also denied Petitioner's claims for
21 habeas relief. Appellate counsel then filed a petition for review and Petitioner filed a pro se
22 petition for writ of habeas corpus in the California Supreme Court. Both were summarily denied.

23 In this federal habeas corpus petition Petitioner raises the following claims, all of which
24 are exhausted for the purpose of federal review: (1) the in-field identification procedure was
25 unduly suggestive; (2) he was subjected to an illegal police interrogation; (3) the ineffective
26 assistance of trial counsel; (4) the denial of his right to self-representation; (5) prosecutorial
27 misconduct; (6) inadequate assistance by his court-appointed investigator; (7) judicial bias;
28 (8) juror misconduct; (9) insufficiency of the evidence to support the convictions; (10) denial of
the presentation of newly discovered exculpatory evidence; and (11) the ineffective assistance of

1 appellate counsel.

2 DISCUSSION

3 A. Standard of Review

4 A federal habeas court will entertain a petition for writ of habeas corpus “in behalf of a
5 person in custody pursuant to the judgment of a State court only on the ground that he is in
6 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
7 § 2254(a). The court may not grant a petition with respect to any claim that was adjudicated on
8 the merits in state court unless the state court’s adjudication of the claim “resulted in a decision
9 that was contrary to, or involved an unreasonable application of, clearly established Federal law,
10 as determined by the Supreme Court of the United States[.]” *Id.* § 2254(d)(1).

13 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
14 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if
15 the state court decides a case differently than [the Supreme] Court has on a set of materially
16 indistinguishable facts.” *Williams v. (Terry) Taylor*, 529 U.S. 362, 412-413 (2000). “Under the
17 ‘unreasonable application clause,’ a federal habeas court may grant the writ if the state court
18 identifies the correct governing legal principle from [the Supreme] Court’s decisions but
19 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal
20 habeas court may not issue the writ simply because the court concludes in its independent
21 judgment that the relevant state court decision applied clearly established federal law erroneously
22 or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

25 A federal court making the “unreasonable application” inquiry in a habeas case should
26 ask whether the state court’s application of clearly established federal law was “objectively
27 unreasonable.” *Id.* at 409. The “objectively unreasonable” standard does not equate to “clear
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1 error” because “[t]hese two standards . . . are not the same. The gloss of clear error fails to give
2 proper deference to state courts by conflating error (even clear error) with unreasonableness.”
3 Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (citation omitted). This standard of review,
4 however, does not relieve a federal court of review from its duty to examine and analyze the state
5 court’s application of federal law.
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7 A federal habeas court also may grant the writ if it concludes that the state court’s
8 adjudication of the claim “resulted in a decision that was based on an unreasonable determination
9 of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C.
10 § 2254(d)(2). The court must presume correct any determination of a factual issue made by a
11 state court unless the petitioner rebuts the presumption of correctness by clear and convincing
12 evidence. 28 U.S.C. §2254(e)(1).
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14 In determining whether the state court’s decision is contrary to, or involved an
15 unreasonable application of, clearly established federal law, a federal court looks to the decision
16 of the highest state court to address the merits of a petitioner’s claim in a reasoned decision.
17 LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). It also looks to any lower court
18 decision examined or adopted by the highest state court to address the merits. See Williams v.
19 Rhoades, 354 F.3d 1101, 1106 (9th Cir. 2004). Where the state court gives no reasoned
20 explanation of its decision on a petitioner’s federal claim and there is no reasoned lower court
21 decision on the claim, a review of the record is the only means of deciding whether the state
22 court’s decision was objectively reasonable. See Himes v. Thompson, 336 F.3d 848, 853 (9th
23 Cir. 2003). When confronted with such a decision, a federal court should conduct “an
24 independent review of the record” to determine whether the state court’s decision was an
25 unreasonable application of clearly established federal law. Id.
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1 If constitutional error is found, habeas relief is warranted only if the error had a
2 “substantial and injurious effect or influence in determining the jury’s verdict.” Penry v.
3 Johnson, 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).
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5 **B. Petitioner’s Claims**

6 1. Unduly Suggestive In-Field Identification Procedure

7 a. Background

8 _____Petitioner maintains that evidence that Jane Doe positively identified him at an in-field
9 show-up should not have been admitted at trial. Specifically, he claims that the identification
10 procedure was unduly suggestive because he was handcuffed and standing with police officers.
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12 At the preliminary hearing, during cross-examination by the attorney who was still
13 representing Petitioner at the time, Jane Doe testified that after the police had arrived and she had
14 described her assailant to them, they took her in the car with them. They did not tell her there
15 was someone they wanted her to identify, but at some point the car stopped and the police asked
16 her whether she saw the man who had assaulted her. She told them yes. Defense counsel then
17 asked:
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19 Q: Now, that man was in the company of other police officers?

20 A: Yes.

21 Q: It was obvious?

22 A: Yes.

23 Q: And he was in handcuffs?

24 A: Yes.

25 CT 69.

26 Jane also testified that there was no doubt in her mind that the man was her assailant, nor
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1 was there a possibility that she was mistaken in her identification. Id. She stated that she
2 recognized him both by his clothing and his face, and that he looked no different when he was
3 with the police than when she had seen him before. Id.
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5 At trial Jane again testified about the identification. She said that after she spoke with
6 Officer Wong about the assault, he and another police officer drove her around the park where
7 the incident occurred to look for the assailant, and then drove her to 88th and Holly, where she
8 saw Petitioner with the police. RT 211-12. She said that Petitioner was wearing the same
9 clothes he wore when he assaulted her, and that she recognized him by his face and his clothes,
10 which she described in detail. RT 212-14. When asked whether anyone told her that the man on
11 88th was the same man who had assaulted her she replied “no.” RT 214. She again said that she
12 knew it was the same man because she recognized his face. Id.
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14 Officer Scott Wong, who was dispatched to respond to the 911 call made on Jane’s
15 behalf, testified that a few minutes after he broadcast the descriptive information of the assailant
16 provided by Jane he received a radio communication from Officer Jimmy Wong to come to 88th
17 Avenue. When they arrived at the location he saw a patrol car, and Officer Jimmy Wong
18 standing next to a man that matched the description Jane had given him. RT 313.14. Jane was
19 “certain” when she said to him “That’s the man.” RT 314. On cross-examination Officer Scott
20 Wong said that he did not see Petitioner handcuffed, nor had Jane Doe said to him that she saw
21 Petitioner “handcuffed with a lot of police officers around.” RT 333-34.
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24 Officer Jimmy Wong testified that at around 12:08 p.m., a few minutes after receiving a
25 dispatch about the assault of Jane Doe, he was driving on 88th Avenue and saw a person who
26 matched the description of the suspect. RT 372. He told Petitioner to stop, got out of his patrol
27 car, and searched him. Two more one-man patrol cars and an Oakland Police Ranger car arrived.
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1 Then another car arrived, which Officer Jimmy Wong later learned was Officer Scott Wong's
2 car. Officer Scott Wong then radioed Officer Jimmy Wong, who placed Petitioner under arrest.
3 RT 374-75. On cross-examination Officer Jimmy Wong testified that when he was by himself
4 with Petitioner he had handcuffed him, but after he made sure that Petitioner had no weapons and
5 the first two patrol units and Oakland Police Ranger unit had arrived, he uncuffed Petitioner
6 because he "wanted to make sure [Petitioner was] unhandcuffed during the I.D. so it didn't
7 appear [he was] already a suspect." RT 386. Wong testified that Petitioner was not handcuffed
8 when Jane Doe identified him. Id.

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11 _____ b. Applicable Federal Law

12 Due process protects against the admission of evidence deriving from impermissibly
13 suggestive pretrial identification procedures. Neil v. Biggers, 409 U.S. 188, 196 (1972). To
14 prevail on habeas review, a petitioner must show that the identification procedures used in the
15 case were "so unnecessarily suggestive and conducive to irreparable mistaken identification that
16 he was denied due process of law." Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 1995)
17 (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967). If a challenged procedure is not
18 impermissibly suggestive, the inquiry into the due process claim ends. United States v. Bagley,
19 772 F.2d 482, 492 (9th Cir. 1985). But even if a pretrial procedure is impermissibly suggestive,
20 automatic exclusion of identification testimony is not required. See Manson v. Brathwaite, 432
21 U.S. 98, 113-14 (1977); Neil, 409 U.S. at 188. Identification testimony may properly be allowed
22 into evidence if under the totality of the circumstances the identification is sufficiently reliable.
23 See id.; Bagley, 772 F.2d at 492-93.

24 To determine whether the identification was sufficiently reliable to warrant admission,
25 the court weighs the indicia of reliability against the "corrupting effect of the suggestive
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1 identification procedure itself.” Id. (quoting Manson, 432 U.S. at 114). Several factors which
2 should be considered in evaluating the reliability of both in-court and out-of-court identifications
3 are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the
4 witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal;
5 (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of
6 time between the crime and the confrontation. Id.

8 c. Analysis

9 Under the totality of the circumstances, the admission of Jane Doe’s identification
10 testimony did not violate due process.

11 First, the one-on-one in-field show-up is a legitimate procedure to obtain an out-of-court
12 identification. Bagley, 772 F.2d at 492-93. Moreover, “[t]he use of handcuffs or other indicia of
13 custody will not invalidate a show-up, at least where necessary for the prompt and orderly
14 presentation of the suspect, consistent with protection of the officers and witnesses.” United
15 States v. Kessler, 692 F.2d 584, 586 (9th Cir. 1982); see id. at 585-86 (show-up in which
16 witnesses were confronted with handcuffed suspect not impermissibly suggestive); see also
17 United States v. Jones, 84 F.3d 1206, 1209-10 (9th Cir.) (drive-by identification in which
18 defendant was the only civilian surrounded by police officers was suggestive, but not
19 impermissibly so), cert. denied, 519 U.S. 973 (1996); Bagley, 772 F.2d at 493 (post-arrest show-
20 up in which witness saw defendant handcuffed and surrounded by police officers not
21 impermissibly suggestive). Thus, whether Petitioner was handcuffed and surrounded by police is
22 not the decisive factor, as long as Jane Doe’s identification of him was reliable. Id.

23 Here, all of the indicia of reliability weigh in favor of admitting Jane’s identification.
24 First, she had ample opportunity to view Petitioner’s face and clothing during the period of time
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1 when he lifted her from the sandbox, carried her to the creek and assaulted her. Second, it was
2 likely that Jane paid good attention to Petitioner not only because she was under his control and
3 in fear for her safety, but also because there were no other distractions – Petitioner was the only
4 other person present during the entire encounter, and Jane was in a location with which she was
5 familiar. Third, Jane gave descriptions of Petitioner’s physical characteristics and his clothing
6 both to the 911 dispatcher and to Officer Scott Wong which were quite accurate. Fourth, Jane
7 expressed no hesitancy in identifying Petitioner as soon as she saw him on the street. Finally,
8 less than an hour had passed between the approximate time of Jane’s assault and her
9 identification of Petitioner, and he was seen walking on 88th Avenue, where the assailant had
10 told Jane he lived.

11
12 Under the totality of the circumstances, Jane Doe’s identification of Petitioner was
13 sufficiently reliable that it cannot be said that the in-field identification procedure was “so
14 unnecessarily suggestive and conducive to irreparable mistaken identification” that Petitioner
15 was denied due process of law. Johnson, 63 F.3d 929. Because the state court’s rejection of this
16 claim was not contrary to, or an unreasonable application of, clearly established federal law, this
17 claim for habeas corpus relief is denied.

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20 2. Illegal Interrogation

21 a. Background

22 Following his arrest, Petitioner was interviewed by Detective Pete Sarna, who took a
23 statement from him. During pre-trial motions, the prosecutor, Mr. Barni, told the court that he
24 did not intend to use the statement in his case-in-chief because he believed it to be inadmissible
25 hearsay with no exceptions. He also requested that Petitioner be instructed not to raise the topic
26 of the “self-serving” statement before the jury. RT 124. Petitioner objected, making clear that he
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1 wished to present to the jury the contents of the taped interview, in order to show that Detective
2 Sarna had lied to him during the interview. RT 124-26. The court ruled that the tape could not
3 be played for the jury, and that the admissibility of statements made by Detective Sarna at the
4 interview for impeachment purposes would be ruled upon if the issue arose. RT 126-27.
5

6 During his opening statement Petitioner referred to the interview and the court reminded
7 him that he could not do so, explaining to the jury that Petitioner was referring to an out-of-court
8 statement that was inadmissible hearsay. Following a recess, Petitioner moved to play the taped
9 interview in order to impeach Detective Sarna. During a hearing outside of the presence of the
10 jury, the court confirmed that the prosecutor did not intend to call Detective Sarna as a witness, at
11 which point Petitioner said that he planned to do so. RT 393-94. The court then asked Petitioner
12 to make an offer of proof as to the relevance of Detective Sarna's testimony. RT 395.
13

14 On the stand Detective Sarna admitted that he had lied to Petitioner during the course of
15 the interview, telling Petitioner that the victim had been raped, that the police had DNA evidence
16 identifying Petitioner as the perpetrator, and that the police had a Mexican witness who could
17 identify Petitioner. Detective Sarna explained his use of tactics, saying,
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19 Yes, your honor, those are simple techniques during an interview that were only
20 used during that interview. Nowhere in any police report did I fabricate and say
21 that I had DNA evidence to get the case charged. It's just a simple ruse technique
22 confronting a potential suspect that yes, we have someone who saw you do it, and
23 that's the only time that it was used. It was never documented, it was never in a
24 police report saying that was a fact. It was not considered by the district attorney
25 for charging purposes at all.

26 RT 402-03.

27 The court noted that Detective Sarna had lied during the interview, but that such evidence
28 was not relevant to the case, and explained that Petitioner must still show what relevant evidence
he hoped to elicit from Detective Sarna at trial. RT 404-07. Petitioner continued to focus on the

1 fact that Detective Sarna had lied. The court then ruled that Petitioner had failed to show that
2 there was relevant testimony he wished to elicit from Detective Sarna that could then be
3 impeached by playing the tape of the interview for the jury. RT 408-09. Therefore, the tape
4 would not be admitted into evidence. RT 409. During trial Petitioner again moved to present the
5 tape, and the court rejected the request. During his testimony Petitioner referred to the taped
6 interview, and the court sustained the prosecutor's hearsay objection when Petitioner attempted
7 to recount what he had been told during the interview. RT 606.
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10 Petitioner made identical motions for a new trial and for a mistrial in which he claimed
11 that the exclusion of the taped statement denied him due process. The court rejected these
12 arguments because of its prior rulings that the statements were inadmissible hearsay. RT 843.
13 At no time during trial or in post-trial motions did Petitioner argue that his Miranda rights had
14 been violated by Detective Sarna during the interview. The first time Petitioner raised this
15 argument was in his pro se state habeas corpus petition, which the California Court of Appeal
16 summarily denied.
17

18 b. Applicable Federal Law

19 In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that a suspect
20 subjected to custodial interrogation must first be advised that he has the right to remain silent,
21 that statements made can be used against him, that he has the right to counsel, and that he has the
22 right to have counsel appointed. These warnings must precede any custodial interrogation, which
23 occurs whenever law enforcement officers question a person after taking that person into custody
24 or otherwise significantly depriving a person of freedom of action. See Miranda, 384 U.S. at
25 444. If the suspect indicates a request for counsel, "the interrogation must cease until an attorney
26 is present." Edwards v. Arizona, 451 U.S. 477 (1981).
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1 Miranda provides for warning requirements effective to secure the Fifth Amendment's
2 privilege against self-incrimination. The remedy for a violation of these requirements is the
3 suppression, at the subsequent trial, of the statements made incriminating the defendant in the
4 crime about which he was questioned. Miranda, 384 U.S. at 479; see Jackson v. Giurbino, 364
5 F.3d 1002, 1009-10 (9th Cir. 2004) (because Miranda offers a "bright-line" test for the
6 admissibility of statements made in response to police interrogation, state courts act contrary to
7 clearly established constitutional law when they fail to exclude statements obtained in violation
8 of Miranda). The requirements of Miranda are "clearly established" federal law for purposes of
9 federal habeas corpus review under 28 U.S.C. § 2254(d). Juan H. v. Allen, 408 F.3d 1262, 1271
10 (9th Cir. 2005).

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13 c. Analysis

14 Petitioner argues that he is entitled to habeas relief because he asked for a lawyer during
15 the course of his interview with Detective Sarna but his request was denied. This claim is
16 without merit. Even if Petitioner's right to counsel was violated during the interview, the record
17 makes abundantly clear that, despite Petitioner's repeated requests to have the tape of the
18 interview played to the jury in its entirety, no statement made by Petitioner during the interview
19 was admitted at trial, and no reference to the contents of the interview was made other than by
20 Petitioner. Because no incriminating statements made by Petitioner during the interview were
21 admitted against him at trial in violation of Miranda, no due process violation occurred.
22 Therefore, the state court's rejection of this claim was not contrary to, or an unreasonable
23 application of, clearly established federal law, and this claim for habeas corpus relief is denied.
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26 3. Ineffective Assistance of Counsel

27 Petitioner claims that he was denied the effective assistance of counsel before and during
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1 his preliminary hearing. For the reasons discussed below, the Court finds that the state court's
2 rejection of this claim was not contrary to, or an unreasonable application of, clearly established
3 federal law. Therefore, this claim for habeas corpus relief is denied.
4

5 a. Background

6 On January 15, 1999 attorney Marvin E. Levy was appointed to represent Petitioner at
7 trial. CT 191. On January 25, 1999 Mr. Levy requested a physical lineup pursuant to Evans v.
8 Superior Court, 11 Cal. 3d 617 (1974). Id. On January 26 the motion was granted, with an order
9 to hold the lineup before the preliminary hearing. Id.
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11 On January 31, 1999 a physical lineup was held at the police department. CT 191.
12 Petitioner was allowed to select the five other participants and arrange their order in the lineup.
13 Id. The victim, Jane Doe, identified Petitioner. Mr. Levy and his paralegal sat in the audience
14 and observed the lineup.
15

16 On February 1, 1999 the preliminary hearing was held. CT 5. The prosecution presented
17 Jane Doe as its only witness. CT 9-80. Jane identified Petitioner in court as her attacker. CT 36.
18 She was questioned by the prosecutor and Mr. Levy. CT 9-80. After the prosecutor rested, Mr.
19 Levy said he did not wish to offer any evidence. CT 80-81. Mr. Levy noted, however, that
20 Petitioner insisted on testifying and that if he did so it was over Mr. Levy's objection. CT 81.
21 The trial court advised Petitioner that he had "a very experienced, very able lawyer representing
22 [him] in this matter." Id. The court suggested that Petitioner talk with Mr. Levy and make sure
23 he understood the potential consequences of taking the stand. Id.
24

25 After the lunch recess Petitioner made a motion to substitute counsel, pursuant to People
26 v. Marsden, 2 Cal. 3d 118 (1970). The motion was heard and denied. CT 84. The court,
27 however, granted Petitioner's motion to represent himself pursuant to Faretta v. California, 422
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1 U.S. 806 (1975). CT 84. Petitioner took the stand and testified regarding an alibi defense. CT
2 85-104. After hearing argument, the court held Petitioner to answer on the charges in the first
3 amended complaint. CT 113-15.
4

5 At trial, Petitioner called Mr. Levy as a defense witness, apparently to show that
6 incompetence and/or conspiratorial intent by Mr. Levy had contributed to the prosecution's case
7 and the evidence against Petitioner. On direct examination, Petitioner questioned Mr. Levy
8 about whether he had followed through as promised by delivering requested documents to
9 Petitioner at the jail, including the police report; whether Mr. Levy had adequately represented
10 Petitioner's interests when he requested a physical lineup and during the lineup; whether Mr.
11 Levy had adequately investigated the matter of whether Petitioner wore false teeth; and whether
12 Mr. Levy had adequately investigated the crime scene and spoken to possible witnesses. RT 644-
13 666.
14

15 b. Applicable Federal Law
16

17 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
18 Amendment right to counsel, which guarantees not only assistance, but effective assistance of
19 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any
20 claim of ineffectiveness must be whether counsel's conduct so undermined the proper
21 functioning of the adversarial process that the trial cannot be relied upon as having produced a
22 just result. Id. The right to effective assistance of counsel applies to the performance of both
23 retained and appointed counsel without distinction. See Cuyler v. Sullivan, 446 U.S. 335, 344-
24 45 (1980).
25

26 In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, a petitioner
27 must make two separate showings. First, he must establish that counsel's performance was
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1 deficient, that is, that it fell below an “objective standard of reasonableness” under prevailing
2 professional norms. Strickland, 466 U.S. at 687-88. Second, he must establish that he was
3 prejudiced by counsel’s deficient performance, that is, that “there is a reasonable probability that,
4 but for counsel’s unprofessional errors, the result of the proceeding would have been different.”
5 Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the
6 outcome. Id.

7
8 The Strickland framework for analyzing ineffective assistance of counsel claims is
9 considered to be “clearly established Federal law, as determined by the Supreme Court of the
10 United States” for the purposes of 28 U.S.C. § 2254(d) analysis. See Williams (Terry) v. Taylor,
11 529 U.S. 362, 404-08 (2000).

12
13 c. Analysis

14 (1) Failure to conduct adequate investigation

15 A defense attorney has a general duty to make reasonable investigations or to make a
16 reasonable decision that makes particular investigations unnecessary. See Strickland, 466 U.S. at
17 691. Counsel must, at a minimum, conduct a reasonable investigation enabling him to make
18 informed decisions about how best to represent his client. Avila v. Galaza, 297 F.3d 911, 924
19 (9th Cir. 2002). However, where the decision not to investigate further is taken because of
20 reasonable tactical evaluations, the attorney's performance is not constitutionally deficient. See
21 Siripongs v. Calderon, 133 F.3d 732, 734 (9th Cir. 1998). Strickland directs that ““a particular
22 decision not to investigate must be directly assessed for reasonableness in all the circumstances,
23 applying a heavy measure of deference to counsel’s judgments.”” Silva v. Woodford, 279 F.3d
24 825, 836 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 491).

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28 Petitioner claims that Mr. Levy was ineffective because he failed to interview certain

1 witnesses and to obtain certain evidence. In particular, he contends Mr. Levy failed to interview
2 Jane Doe's teacher and doctor and to obtain copies of Jane Doe's "medical and school grade
3 record" from them; failed to interview the doctors who gave Jane Doe the sexual assault
4 examination at the hospital and obtain a report from them; failed to interview all three of the
5 pawn shop workers and to obtain copies of the pawn shop receipt and the pawn shop video
6 camera tape of January 4, 1999; and failed to find and interview Kenitra Gayle Lewis Frazier –
7 the person he claimed he asked to pawn something for him at the time of the assault – and to
8 obtain a copy of her pawn shop ticket.
9

10
11 The duty to investigate and prepare a defense does not require that every conceivable
12 witness be interviewed. Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). A
13 defendant's mere speculation that a witness might have given helpful information if interviewed
14 is not enough to establish ineffective assistance. See Bragg v. Galaza, 242 F.3d 1082, 1087 (9th
15 Cir.), amended, 253 F.3d 1150 (9th Cir. 2001). To establish prejudice caused by the failure to
16 call a witness, a petitioner must show that the witness was likely to have been available to testify,
17 that the witness would have given the proffered testimony, and that the witness's testimony
18 would have created a reasonable probability that the jury would have reached a verdict more
19 favorable to the petitioner. Alcala v. Woodford, 334 F.3d 862, 872-73(9th Cir. 2003).
20

21
22 The failure to present probative, noncumulative evidence in support of a chosen defense
23 strategy is not deficient performance if there exists a reasonable tactical justification. Id. at 871-
24 72. A habeas petitioner has the burden of showing through evidentiary proof that counsel's
25 performance was deficient. See Toomey v. Bunnell, 898 F.2d 741, 743 (9th Cir.), cert. denied,
26 498 U.S. 960 (1990); see also Rios v. Rocha, 299 F.3d 796, 813 n.23 (9th Cir. 2002) (rejecting
27 two ineffective assistance of counsel claims based on petitioner's failure to produce evidence of
28

1 prejudice).

2 With respect to Jane Doe's teacher and doctor and the doctors who examined Jane Doe at
3 the hospital, Petitioner has failed to explain how interviews of these witnesses or Jane Doe's
4 school grade and medical reports would have benefitted him at the preliminary hearing, when he
5 was still represented by counsel, or at trial. Moreover, Petitioner did have access to the medical
6 report prepared following Jane Doe's sexual assault examination. No doctor was called to testify
7 at trial by either side.
8

9 With respect to the pawn shop workers and Kenitra Frazier, Petitioner claims that they
10 could have presented testimony relevant to his alibi defense, that is, that he was at the pawn shop
11 at the time of the assault. However, he does not establish that their testimony would have
12 benefitted him at the preliminary hearing, nor has he shown how counsel's failure prejudiced him
13 at trial. That is, Petitioner was not prevented from contacting and interviewing these witnesses
14 simply because counsel had failed to do so. The record shows that during discovery the
15 prosecution provided Petitioner with the receipt from the pawn shop signed by Kenitra Frazier,
16 including personal information about her, CT 188, and with an inspector's report of a telephone
17 interview with Kenitra Frazier, CT 209. Also, an investigator appointed to assist Petitioner after
18 he was granted leave to proceed in pro per was actively pursuing Kenitra Frazier's whereabouts
19 just prior to trial but had not been able to find her, and Petitioner agreed to start the trial without
20 her. RT 9. Similarly, counsel's failure to call the pawn shop employees at the preliminary
21 hearing did not prevent Petitioner from contacting and interviewing them prior to trial, and
22 Petitioner in fact called one of the employees, Yolanda Johnson, to testify at trial. RT 579.
23

24 Petitioner also claims that Mr. Levy was ineffective because he failed to obtain the DNA
25 reports from the police. However, the record establishes that although samples were taken from
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1 Petitioner, no tests were ever run on the samples or reports prepared. Petitioner has failed to
2 provide any evidence that this was not the case.

3 Finally, Petitioner claims that Mr. Levy failed to investigate his alibi defense. However,
4 Mr. Levy's testimony at trial shows that he visited the crime scene three times before the
5 preliminary hearing, and that he obtained a statement from David James, the park employee who
6 was working the day of the assault. He also spoke with the neighbor who had called the police
7 after Jane Doe reported she had been assaulted. RT 655, 666. Moreover, Petitioner has not
8 shown how further investigation of the alibi defense by counsel would have led to a different
9 result at the preliminary hearing or at trial, where in both instances Petitioner took the stand as a
10 witness and asserted his defense.
11

12
13 (2) Failure to file motions

14 Petitioner claims that Mr. Levy was ineffective because he refused to file motions
15 challenging the suggestive identification procedure and Petitioner's unlawful interrogation.
16

17 A lawyer need not file a motion that he knows to be meritless on the facts and the law.
18 Put simply, trial counsel cannot have been ineffective for failing to raise a meritless motion.
19 Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005); see Wilson v. Henry, 185 F.3d 986, 990
20 (9th Cir. 1999) (to show prejudice under Strickland from failure to file a motion, petitioner must
21 show that (1) had his counsel filed the motion, it is reasonable that the trial court would have
22 granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would
23 have been an outcome more favorable to him).
24

25 As discussed above, Petitioner's challenges to the identification procedure and his
26 interrogation are without merit. Accordingly, counsel's failure to file motions regarding these
27 matters was not deficient performance.
28

(3) Lineup request

Petitioner alleges that Mr. Levy provided ineffective assistance because he requested a physical lineup weeks after Petitioner's arrest, and the lineup was held the day before the preliminary hearing. Other than these assertions, however, Petitioner does not state how he was prejudiced by these facts. On its face, this conclusory claim is without merit. During pre-trial proceedings, however, Petitioner moved for dismissal of the charges against him because he maintained that Mr. Levy had conspired with the prosecutor, police and Jane Doe to produce an unfair lineup. Therefore, the Court will also consider whether there might be merit to the claim that Mr. Levy provided ineffective assistance for that reason.

The trial court held an evidentiary hearing on Petitioner's motion to dismiss, and Mr. Levy was called as a witness. RT 52. He testified that he had decided to request a physical lineup after consulting with the attorney who had first represented Petitioner before he had to withdraw because of a conflict of interest. RT 58, 68. During questioning, Petitioner focused on the role Mr. Levy had played at the lineup, that is, whether he had actively represented Petitioner's interests by keeping an eye on Jane Doe and her interactions with the police officers and the district attorney who were present, or whether he had allowed and/or conspired with the police and the district attorney to tell Jane Doe whom to identify as her assailant at the lineup and at the preliminary hearing. RT 53-64, 91. Other witnesses were called as well, and the court watched a tape of the lineup. The court ruled that the lineup was fairly conducted, and,

I find also that from the testimony Mr. Levy behaved and comported himself in a manner consistent with that of a competent defense attorney. I find no evidence at all of collusion between Mr. Levy and the prosecution and law enforcement to deprive Mr. Hardaway of due process rights.

RT 93.

At trial, Mr. Levy testified again about the lineup, stating that it was his idea, which he

1 presented to Petitioner to see if Petitioner would approve or if he thought it was a good idea. RT
2 646-47. He also testified about what he believed to be his role at a lineup – to observe and to
3 speak up if he thinks something is improper or unfair. 658-59. He explained that he would
4 observe whether people are talking to the victim, whether the people in the lineup look fairly
5 reasonable, whether the victim talks to anybody, and what the victim’s reaction would be as the
6 people in the lineup come in. RT 667. He testified about who had been in the audience at the
7 lineup, the nature of his prior acquaintances, if any, with the police officers and district attorney
8 who had been present at the lineup, and his lack of interaction with them during or after the
9 lineup. RT 644-667.
10
11

12 Based upon this record, this Court finds no merit to Petitioner’s claim that Mr. Levy’s
13 decision to request a physical lineup and his behavior during and after the lineup amounted to the
14 ineffective assistance of counsel.
15

16 (4) Cross-examination and credibility of Jane Doe

17 Petitioner claims that Mr. Levy was ineffective because he failed to adequately cross-
18 examine Jane Doe at the preliminary hearing, and because he testified at trial that he found her to
19 be a credible witness.
20

21 The record of the preliminary hearing shows that the length of the prosecution’s and the
22 defense’s examinations of Jane Doe were approximately the same. On cross-examination by the
23 prosecutor at trial, Mr. Levy testified that he had questioned Jane Doe in a way that he believed
24 was appropriate for a child of her age, RT 661, and when asked by the prosecutor whether he had
25 found Jane Doe to be a credible witness, he replied, “Yes.” RT 662. Petitioner did not object.
26 Rather, on redirect examination, he asked Mr. Levy, “Do you think that Jane Doe was telling you
27 the truth?” RT 663. Mr. Levy asked Petitioner, “You want me to answer that?” Id. Petitioner
28

1 said, "Yes." Id. The court interjected, "Mr. Hardaway, I think that Mr. Levy's opinion of
2 credibility is not relevant to this case." Id.

3 Petitioner has not explained how Mr. Levy's cross-examination of Jane Doe was deficient
4 or specified what questions should have been asked, such that the result of the preliminary
5 hearing would have been different. Nor has he explained how the cross-examination could have
6 affected the outcome of his trial, especially since he questioned Jane Doe at length at trial.
7
8 Petitioner also has not explained how Mr. Levy's testimony at trial could have amounted to
9 ineffective assistance of counsel, when at the time Mr. Levy testified he no longer represented
10 Petitioner. These claims are without merit.

11
12 (5) Conversation about Petitioner's teeth

13 The question whether Petitioner had false teeth was relevant to the fact that Jane Doe did
14 not tell police that her attacker was missing any teeth, but when Petitioner was identified in the
15 lineup by Jane Doe she said he was missing his top front teeth. Petitioner claims that at some
16 time prior to the preliminary hearing Mr. Levy called to speak with Petitioner's wife and told her
17 that Petitioner had said something about taking out his false teeth, but Petitioner's wife told Mr.
18 Levy that Petitioner didn't have false teeth. Petitioner's claim seems to be that Mr. Levy's
19 failure to further investigate and develop the issue of the false teeth at the preliminary hearing
20 amounted to the ineffective assistance of counsel. When questioned by Petitioner at trial, Mr.
21 Levy testified that he vaguely remembered talking with Petitioner's wife about Petitioner's teeth,
22 but it did not seem particularly important at the time. RT 648.

23
24 Petitioner has not shown that counsel's performance prejudiced his ability to obtain a fair
25 preliminary hearing or trial. Petitioner took the stand on his own behalf at the preliminary
26 hearing and was not prevented from presenting testimony about any discrepancies between Jane
27
28

1 Doe's description of the assailant and his appearance. Moreover, at trial he presented several
2 witnesses, each of whom testified that he did not own false teeth, and he argued his theory of
3 misidentification during closing argument.
4

5 For the foregoing reasons, Petitioner's claim of ineffective assistance of trial counsel is
6 denied.

7 4. Denial of the Right to Self-Representation

8 a. Background

9
10 Petitioner claims that he was denied the right to represent himself because of various
11 evidentiary and procedural rulings the trial court made, and admonitions the court gave to him
12 about how to conduct himself during trial.

13 b. Applicable Federal Law

14 A criminal defendant has a Sixth Amendment right to self-representation. See Faretta v.
15 California, 422 U.S. 806, 832 (1975). This right exists despite the fact that, in most cases, a
16 defendant would be better served by counsel. Id. at 834. While a trial judge may doubt the
17 quality of representation that a defendant may provide for himself, the defendant must be allowed
18 to exercise his right to self-representation so long as he knowingly and intelligently waives his
19 right to counsel and is able and willing to abide by rules of procedure and courtroom protocol.
20
21 See McKaskle v. Wiggins, 465 U.S. 168, 173 (1984). A trial court may refuse to permit a
22 criminal defendant to represent himself when he is "not able and willing to abide by rules of
23 procedure and courtroom protocol." Savage v. Estelle, 924 F.2d 1459, 1463 (9th Cir. 1991). But
24 a criminal defendant's unfamiliarity with the rules of evidence or the specifics of criminal
25 procedure, without severely disruptive behavior, is not sufficient to override his right of self-
26 representation. See United States v. Lopez-Osuna, 242 F.3d 1191, 1200 (9th Cir. 2001).
27
28

1 c. Analysis

2 The record is clear that Petitioner requested and was granted the right to represent himself
3 midway through the preliminary hearing. The objections he raises now do not go to the question
4 whether the judge's decision to do so was proper. Rather, they pertain to court rulings and
5 admonitions which he maintains prejudiced his ability to exercise his right to self-representation.
6 Having reviewed the state court record in its entirety, this Court finds no merit to Petitioner's
7 claim. The trial court's evidentiary and procedural rulings were based on basic legal concepts
8 which are applicable to pro se and represented litigants alike. In fact, it is clear from the record
9 that the trial court took great care to address in detail all evidentiary matters raised by Petitioner,
10 even those which might have been resolved in a more perfunctory manner. Similarly, the record
11 shows that the court's admonitions to Petitioner were few and far between, even though
12 Petitioner at times persisted in ignoring the court's rulings pertaining to what evidence could be
13 admitted or argued to the jury, or the proper demeanor to be used when questioning a witness,
14 such as the minor victim Jane Doe. The state court's rejection of this claim was not contrary to,
15 or an unreasonable application of, clearly established federal law. Accordingly, this claim for
16 habeas corpus relief is denied.
17

18 5. Prosecutorial Misconduct

19 a. Background

20 In post-trial motions for a new trial and for a mistrial Petitioner claimed that the
21 prosecutor committed misconduct by suborning perjury of witnesses (including Jane Doe),
22 presenting false evidence, refusing to provide Petitioner with discovery, and attempting to
23 influence the jury. The trial court held a hearing on the motions at which both Petitioner and the
24 prosecutor argued. The court then denied the motions summarily. In the present petition,
25
26
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1 Petitioner asserts several grounds for prosecutorial misconduct, all of which this Court finds to
2 be without merit, as discussed below.

3 b. Applicable Federal Law

4
5 Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate
6 standard of review is the narrow one of due process and not the broad exercise of supervisory
7 power. See Darden v. Wainwright, 477 U.S. 168, 181 (1986). The right to due process is
8 violated when a prosecutor's misconduct renders a trial "fundamentally unfair." See id.; Smith v.
9 Phillips, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged
10 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor").
11 Claims of prosecutorial misconduct are reviewed on the merits, examining the entire proceedings
12 to determine whether the prosecutor's actions "so infected the trial with unfairness as to make the
13 resulting conviction a denial of due process." Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir.
14 1995) (internal quotation marks and citation omitted).

15
16
17 c. Analysis

18 For the following reasons, the Court finds that the state court's rejection of Petitioner's
19 prosecutorial misconduct claim was not contrary to, or an unreasonable application of, clearly
20 established federal law. Accordingly, this claim for habeas corpus relief is denied.

21
22 (1) Perjury and false evidence

23 Petitioner claims that the prosecutor suborned perjury of witnesses and presented false
24 evidence because: (1) he coached Jane Doe to lie while she was testifying; (2) he introduced false
25 evidence, including Petitioner's clothes and falsified pawn shop receipts; and (3) he used
26 perjured testimony from three police officers, Yolanda Johnson, and Mr. Levy.

27
28 When a prosecutor obtains a conviction by the use of testimony which he knows or

1 should know is perjured it has been held consistently that such conviction must be set aside if
2 there is any reasonable likelihood that the testimony could have affected the judgment of the jury.
3 United States v. Agurs, 427 U.S. 97, 103 (1976). But prosecutors will not be held accountable
4 for discrepancies in testimony where there is no evidence from which to infer prosecutorial
5 misconduct. See United States v. Zuno-Arce, 44 F.3d 1420, 1423 (9th Cir. 1995). A factual
6 basis for attributing knowledge to the government that the testimony was perjured must be
7 established. See Morales v. Woodford, 388 F.3d 1159, 1179 (9th Cir. 2004). To prevail on such
8 a claim the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the
9 prosecution knew or should have known that the testimony was actually false, and (3) the false
10 testimony was material. Zuno-Arce, 339 F.3d at 889. A habeas petitioner must also show
11 whether there was “any reasonable likelihood” that the false evidence could have affected the
12 jury’s judgment. Id.

13
14
15 Petitioner’s allegations are unsupported by the record or any identifiable evidence
16 outside the record.

17
18 With respect to the testimony of Jane Doe and the other witnesses, Petitioner has shown only that
19 there were discrepancies in their testimony. Petitioner ably brought these discrepancies to the
20 attention of the jury, which was responsible for making the ultimate determinations regarding
21 witness credibility.

22
23 With respect to the introduction of Petitioner’s clothing at trial, the prosecutor called
24 several witnesses to establish a chain of custody and control over the clothing from the time
25 Petitioner was arrested until it was admitted into evidence at trial. Petitioner had the opportunity
26 to question these witnesses, and he did so. In fact, Petitioner’s argument at trial was that the
27 clothing was his and that it did not match the descriptions given by Jane Doe.
28

1 With respect to the pawn shop receipt, Petitioner continues to assert that the prosecutor
2 engaged in misconduct by fabricating various pawn shop receipts in order to refute evidence
3 which showed that Kenitra Frazier pawned Petitioner's bracelet at 11:43 a.m. on January 4, 1999
4 – which would have made it impossible for him to have assaulted Jane Doe according to the
5 prosecutor's time line. However, in opposition to Petitioner's new trial motion the prosecutor
6 aptly described the relevance of the various pawn shop receipts disclosed to Petitioner during
7 pretrial discovery. This information was obtained from Yolanda Johnson, the pawn shop
8 employee who testified as a defense witness at trial: (1) the pawn shop's copy of the receipt
9 signed by Kenitra Frazier when she pawned the bracelet on January 4, 1999 is kept in a receipt
10 book; (2) the signed pawn receipt has a time stamp which appears to be 12:01 p.m.; (3) the clock
11 on the computer which generated the pawn receipt was forty minutes fast on March 3, 1999;
12 (4) the clock on the computer had not been reset between January 4 and March 3; (5) the copy of
13 the pawn receipt for the Frazier transaction which was printed on January 5, 1999 and provided
14 to Detective Sarna is not a true and accurate reproduction of the pawn shop's copy of the pawn
15 receipt – it is not signed by Kenitra Frazier and it has a time stamp of 11:43 a.m., which relates to
16 the time (still forty minutes fast) that it was printed for Detective Sarna, not to the time of the
17 transaction on January 4. CT 433. Thus, as established by the receipts and the testimony of
18 Yolanda Johnson at trial, the pawn receipt time stamped 12:01 p.m. on January 4, 1999 reflects
19 that Kenitra Frazier pawned the bracelet forty minutes earlier, at 11:21 a.m., not at 11:43 a.m., as
20 Petitioner argues. CT 433-34. Petitioner's claim is without merit.

25 (2) Failure to provide discovery and misrepresentations

26 Petitioner claims that the prosecutor refused to provide Petitioner with the DNA results
27 from samples taken from him following his arrest. As discussed earlier in this order, the record
28

1 establishes that although samples were taken from Petitioner, no tests were ever run on the
2 samples or reports prepared. Petitioner has failed to provide any evidence that this was not the
3 case.
4

5 Petitioner also claims that the prosecutor failed to provide him with the contents of the
6 conversation between Kenitra Frazier and Detective Sarna. However, the record shows that
7 Petitioner was provided with a summary of the conversation, and Petitioner has not shown that a
8 tape or transcript of the conversation actually existed and was in the prosecutor's possession. He
9 also has not shown how the failure to provide him with such so infected the trial with unfairness
10 as to make the resulting conviction a denial of due process.
11

12 Finally, Petitioner claims misconduct because the prosecutor told the court that Kenitra
13 Frazier was in Los Angeles. This claim is meritless. Petitioner has presented no evidence that
14 this information was false or, if it was, that the prosecutor knew or should have known that was
15 the case. Similarly without merit are Petitioner's claims of misconduct because the prosecutor
16 asked for the amount of Petitioner's bail to be raised and asked the court to exclude evidence
17 Petitioner attempted to admit in connection with his examination of Yolanda Johnson, the pawn
18 shop employee.
19

20 (3) Improper jury interaction
21

22 Petitioner claims misconduct by the prosecutor during a readback, when the judge was
23 out of the room and the prosecutor told the jurors that if they had any questions they should send
24 him a note and he would go up to the jury room to answer them. In response, Respondent points
25 to the portion of the record where this occurred and notes: "It is clear that the comments quoted
26 by petitioner were actually made by the trial court, but were incorrectly attributed to the
27 prosecutor by the court reporter. RT 778." (Respondent's Memorandum of Points and
28

1 Authorities in Support of Answer to Order to Show Cause at 20:14-15.) This Court has reviewed
2 the noted section and agrees with Respondent's assessment. In any event, the record does not
3 show that the prosecutor ever answered any questions from the jury.
4

5 For these reasons, Petitioner's prosecutorial misconduct claim is denied.

6 6. Inadequate Private Investigator

7 a. Background

8 Petitioner claims that Robert Cross, the private investigator appointed by the trial court to
9 assist Petitioner, conducted an inadequate investigation because he did not subpoena witnesses
10 and documents that Petitioner requested.
11

12 b. Applicable Federal Law

13 There is no clearly established United States Supreme Court authority requiring that
14 indigent defendants who represent themselves be provided with investigative services. In fact,
15 the Supreme Court has specifically declined to decide that question. See Caldwell v. Mississippi,
16 472 U.S. 320, 323 n.1 (1985). Moreover, the Court recently clarified that Faretta v. California,
17 422 U.S. 806 (1975), which established the right to self-representation under the Sixth
18 Amendment, does not clearly establish a right to law library access or any other specific legal aid
19 that must be afforded to a criminal defendant who has chosen to represent himself. See Kane v.
20 Garcia Espitia, 126 S. Ct. 407, 408 (2005).
21
22

23 c. Analysis

24 Petitioner cannot establish that the state court's rejection of this claim was contrary to or
25 an unreasonable application of clearly established federal law because the Supreme Court has not
26 recognized a constitutional right to investigative assistance for criminal defendants. See
27 Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004) (if there is no Supreme Court precedent
28

1 that controls on the legal issue raised by a petitioner in state court, the state court's decision
2 cannot be contrary to, or an unreasonable application of, clearly-established federal law).

3 Accordingly, this claim for habeas corpus relief is denied.
4

5 7. Judicial Misconduct

6 a. Background

7 Petitioner claims that the trial judge was unfair and impartial because she excluded
8 evidence he wanted to present, excluded two investigators from the trial, did not allow him to
9 leave his seat to present his case, did not allow him to question Jane Doe about the clothing
10 presented at trial, did not allow him to recall any witnesses, and did not allow him to question his
11 sister and his wife about their conversation with a police officer.
12

13 b. Applicable Federal Law

14 The Due Process Clause guarantees a criminal defendant the right to a fair and impartial
15 judge. See In re Murchison, 349 U.S. 133, 136 (1955). In some cases, the proceedings and
16 surrounding circumstances may demonstrate actual bias or an appearance of advocacy on the part
17 of the judge amounting to improper conduct. See Taylor v. Hayes, 418 U.S. 488, 501-04 (1974).
18 But judicial rulings alone almost never constitute a valid basis for bias or partiality, as they "can
19 only in the rarest circumstances evidence the degree of favoritism or antagonism required" for
20 such a showing. Liteky v. United States, 510 U.S. 540, 555 (1994).
21

22 Similarly, "opinions formed by the judge on the basis of facts introduced or events
23 occurring in the course of the current proceedings . . . do not constitute a basis for a bias or
24 partiality motion unless they display a deep-seated favoritism or antagonism that would make fair
25 judgment impossible." Id. Thus, judicial remarks during the course of a trial that are critical or
26 disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a
27
28

1 bias or partiality challenge. Id. These include expressions of impatience, dissatisfaction,
2 annoyance and even anger. Id. at 555-56. In short, “[a] judge’s ordinary efforts at courtroom
3 administration – even a stern and short-tempered judge’s ordinary efforts at courtroom
4 administration – remain immune.” Id. at 556.

6 A claim of judicial misconduct by a state judge in the context of federal habeas review
7 does not simply require that the federal court determine whether the state judge committed
8 judicial misconduct; rather, the question is whether the state judge’s behavior “rendered the trial
9 so fundamentally unfair as to violate federal due process under the United States Constitution.”
10 Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995) (citations omitted), cert. denied, 517 U.S.
11 1158 (1996).

13 c. Analysis

14 Petitioner’s challenges to the trial judge’s evidentiary and procedural rulings and her
15 admonitions to Petitioner do not support a claim for judicial misconduct. As noted earlier in this
16 order, “The court’s evidentiary and procedural rulings were based on basic legal concepts which
17 are applicable to pro se and represented litigants alike. In fact, it is clear from the record that the
18 trial court took great care to address in detail all evidentiary matters raised by Petitioner, even
19 those which might have been resolved in a more perfunctory manner. Similarly, the record
20 shows that the court’s admonitions to Petitioner were few and far between, even though
21 Petitioner at times persisted in ignoring the court’s rulings pertaining to what evidence could be
22 admitted or argued to the jury, or the proper demeanor to be used when questioning a witness,
23 such as the minor victim Jane Doe.” (See Section 4(c), supra.)

26 Petitioner has failed to allege any instances of judicial misconduct which rendered his
27 trial fundamentally unfair. Accordingly, the state court’s rejection of this claim was not contrary
28

1 to, or an unreasonable application of, clearly established federal law, and this claim for habeas
2 corpus relief is denied.

3 8. Juror Misconduct

4 a. Background

5
6 Petitioner raises two claims of juror misconduct.

7 His first claim is that the jurors committed misconduct by nodding and smiling at the
8 prosecutor when they entered and left the courtroom. This claim (as well as the related claim that
9 the prosecutor committed misconduct by nodding and smiling at the jurors) was addressed at the
10 post-trial hearing on Petitioner's motions for a new trial and for a mistrial. After hearing
11 argument from Petitioner, the trial judge responded to his assertions as follows:
12

13 On the [] issue as to whether or not Mr. Barni committed an act of misconduct and
14 whether the jury committed an act of misconduct by nodding to Mr. Barni as they
15 entered into the courtroom and as they filed out of the courtroom, you are correct
16 in your assertion that I personally viewed this. I did in fact view this. You are
17 correct. It did occur. However, I would point out to you, Mr. Hardaway, that it
18 occurred in conformance with my original order to the jury that they were to have
19 no oral contact with any of the parties, litigants, attorneys or any -- anyone in this
20 court other than the court staff, and I instructed them at the outset of the trial that
21 if they were to see Mr. Barni, any of the witnesses or any of the litigants or parties
22 in the hallways or even in the courtroom during the pendency of this trial that they
23 were not to engage him in conversation and that they were to nod politely.

24 I interpreted both Mr. Barni's act as well as the act of the jurors of nodding
25 politely to be acts of common courtesy in greeting each other because they were in
26 the same courtroom for a period of several weeks together, and it was solely an act
27 of politeness and courtesy. There was no intended communication. I did not
28 interpret this to be any subtle kind of attempt to influence on either side. It was
solely a matter of courtesy that was demonstrated in open court.

RT 815-16. The judge also noted that she had seen some of the jurors nod to Petitioner as well.

RT 816, 817. The judge denied Petitioner's motions.

Petitioner's second claim of juror misconduct is based on the claim previously raised by
Petitioner as one of prosecutorial misconduct, that is, that the jurors improperly focused their

1 attention on the prosecutor when the judge was out of the courtroom during a readback of
2 testimony, and they did not inform the judge that the prosecutor had told them to direct any
3 questions to him.

4
5 b. Applicable Federal Law

6 The Sixth Amendment guarantees to the criminally accused a fair trial by a panel of
7 impartial jurors. U.S. Const. amend. VI; see Irvin v. Dowd, 366 U.S. 717, 722 (1961). “Even if
8 only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to
9 an impartial jury.” Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990) (internal quotations
10 omitted). However, the Constitution “does not require a new trial every time a juror has been
11 placed in a potentially compromising situation.” Smith v. Phillips, 455 U.S. 209, 217 (1982).
12 The safeguards of juror impartiality, such as voir dire and protective instructions from the trial
13 judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence
14 that might theoretically affect their vote. Id. Due process only means a jury capable and willing
15 to decide the case solely on the evidence before it and a trial judge ever watchful to prevent
16 prejudicial occurrences and to determine the effect of such occurrences when they happen. Id.
17 Such determinations may properly be made at a hearing, which is sufficient to satisfy due
18 process. Id.

19 On federal habeas corpus review, a state court’s factual findings are entitled to deference,
20 and habeas relief will not be warranted unless the federal court concludes that the state court’s
21 adjudication of the claim “resulted in a decision that was based on an unreasonable determination
22 of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C.
23 § 2254(d)(2).

24
25 c. Analysis

1 With respect to Petitioner's first claim of juror misconduct, the trial court held a hearing
2 at which it found that the jurors did nod and smile to the prosecutor upon entering and leaving
3 the courtroom. The court also found that some of the jurors nodded at Petitioner. The court
4 concluded that the nods and smiles were "acts of common courtesy," taken in accord with the
5 court's instructions to the jury, and found that there had been no attempt at influence on either
6 side. The record shows that this was not an unreasonable determination of the facts in light of
7 the evidence before the court, and the court's conclusion that no misconduct occurred was not
8 contrary to, or an unreasonable application of, clearly established federal law.
9

10
11 With respect to Petitioner's second claim of juror misconduct based upon the readback
12 which occurred outside of the judge's presence, earlier in this order this Court rejected
13 Petitioner's characterization of the record. In any event, there is no evidence that any juror ever
14 spoke with the prosecutor.

15 For these reasons, Petitioner's juror misconduct claims are denied.
16

17 9. Insufficient Evidence

18 a. Background

19 Petitioner claims that the evidence was insufficient to support his conviction. In so doing,
20 he points out inconsistencies in witness testimony about the descriptions of his clothing, his
21 teeth, and the timing relating to his alibi defense.
22

23 b. Applicable Federal Law

24 The Due Process Clause "protects the accused against conviction except upon proof
25 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
26 charged." In re Winship, 397 U.S. 358, 364 (1970). A federal court reviewing a claim of
27 insufficient evidence in a habeas petition does not determine whether it is satisfied that the
28

1 evidence meets the reasonable doubt standard. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992).
2 The federal court “determines only whether, ‘after viewing the evidence in the light most
3 favorable to the prosecution, any rational trier of fact could have found the essential elements of
4 the crime beyond a reasonable doubt.’” See id. (quoting Jackson v. Virginia, 443 U.S. 307, 319
5 (1979)). Only if no rational trier of fact could have found proof of guilt beyond a reasonable
6 doubt, may the writ be granted. See Jackson, 443 U.S. at 324.

7
8 The prosecution need not affirmatively rule out every hypothesis except that of guilt.
9 Wright v. West, 505 U.S. 277, 296-97 (1992). The existence of some small doubt based on an
10 unsupported yet unrebutted hypothesis of innocence therefore is not sufficient to invalidate an
11 otherwise legitimate conviction. See Taylor v. Stainer, 31 F.3d 907, 910 (9th Cir. 1994).
12 Circumstantial evidence and inferences drawn from that evidence may be sufficient to sustain a
13 conviction. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). If confronted by a record that
14 supports conflicting inferences, a federal habeas court “must presume – even if it does not
15 affirmatively appear on the record – that the trier of fact resolved any such conflicts in favor of
16 the prosecution, and must defer to that resolution.” Jackson, 443 U.S. at 326. Except in the most
17 exceptional of circumstances, Jackson does not permit a federal habeas court to revisit credibility
18 determinations. See id.

19
20 After AEDPA, a federal habeas court applies the standards of Jackson with an additional
21 layer of deference. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). Generally, a federal
22 habeas court must ask whether the operative state court decision reflected an unreasonable
23 application of Jackson and Winship to the facts of the case. Id. at 1275 (quoting 28 U.S.C.
24 § 2254(d)).

25
26
27 c. Analysis
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1 Petitioner's claim of insufficiency of the evidence does not go to the question whether the
2 evidence presented at trial was sufficient to establish the elements of the crimes. Rather, he
3 argues the weight of the evidence, that is, he reasserts the reasons why the jury should not have
4 credited the witnesses and evidence presented by the prosecution.
5

6 This Court has independently reviewed the record and concludes that after viewing the
7 evidence in the light most favorable to the prosecution, any rational trier of fact could have found
8 the essential elements of the crimes beyond a reasonable doubt. Jane Doe's identifications of
9 Petitioner and his clothing, even with their inconsistencies, were strong, and the prosecution ably
10 discredited Petitioner's alibi defense. Accordingly, the state court's rejection of this claim was
11 not contrary to, or an unreasonable application of, clearly established federal law, and this claim
12 for habeas corpus relief is denied.
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14 10. Presentation of Newly Discovered Evidence
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16 a. Background

17 Petitioner claims that he was denied due process because the trial court did not allow him
18 to present newly-discovered evidence. The specific pieces of evidence he refers to are a video
19 camera tape from the pawn shop dated January 4, 1999, evidence from the report of the sexual
20 assault examination of Jane Doe which shows that she had a scratch under her eye and was
21 depressed because of school, the results of the DNA tests, statements made by Kenitra Frazier in
22 her phone conversation with the prosecutor's inspector, and evidence of statements made to
23 Petitioner by the prosecutor's investigators – Pat Mahaney and Pete Sarna – that would have
24 acquitted Petitioner. Petitioner previously requested an evidentiary hearing from this Court in
25 order to present this evidence. The Court rejected the request because the facts Petitioner wanted
26 the Court to consider were already discovered and presented to the state courts in the underlying
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28

1 state proceedings.

2 b. Applicable Federal Law

3 “State and federal rulemakers have broad latitude under the Constitution to establish rules
4 excluding evidence from criminal trials.” Holmes v. South Carolina, 126 S. Ct. 1727, 1731
5 (2006) (quotations and citations omitted); see also Montana v. Egelhoff, 518 U.S. 37, 42 (1996)
6 (due process does not guarantee a defendant the right to present all relevant evidence). This
7 latitude is limited, however, by a defendant’s constitutional rights to due process and to present a
8 defense, rights originating in the Sixth and Fourteenth Amendments. See Holmes, 126 S. Ct. at
9 1731. “While the Constitution [] prohibits the exclusion of defense evidence under rules that
10 serve no legitimate purpose or that are disproportionate to the ends that they are asserted to
11 promote, well-established rules of evidence permit trial judges to exclude evidence if its
12 probative value is outweighed by certain other factors such as unfair prejudice, confusion of the
13 issues, or potential to mislead the jury.” Id. at 1732; see Egelhoff, 518 U.S. at 42 (the exclusion
14 of evidence does not violate the Due Process Clause unless “it offends some principle of justice
15 so rooted in the traditions and conscience of our people as to be ranked as fundamental.”).

16 c. Analysis

17 Although Petitioner alleges that he was denied the right to present newly-discovered
18 evidence at trial, it is clear from his assertions and from the record that the evidence to which he
19 was refers was in existence (or alleged existence, as in the case of the DNA test results) prior to
20 or at the time of trial. Thus, Petitioner’s claim is more aptly characterized as a challenge to the
21 trial court’s evidentiary rulings, and to what he maintains was the withholding of evidence from
22 him by the prosecution. The latter assertion has already been rejected by this Court in its earlier
23 discussion of Petitioner’s prosecutorial misconduct claim.
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1 Petitioner's objections to the trial court's evidentiary rulings also fail. The statements
2 made by Kenitra Frazier and the prosecutor's inspectors were inadmissible hearsay, and
3 Petitioner has provided no grounds for their admissibility. Petitioner did not call either the
4 doctor who examined Jane Doe or Jane Doe's mother as witnesses, and he does not explain how
5 the reports of their statements would otherwise be admissible. Petitioner has not established that
6 a video tape from the camera at the pawn shop exists for January 4, 1999, or that it shows his
7 presence at the pawn shop at the time he claims to have been there. Petitioner also has not
8 established the existence of any DNA test results.
9

10
11 Petitioner has also failed to show that the trial court's evidentiary rulings deprived him of
12 his right to present a defense. He testified at length at trial and presented evidence to support his
13 claim that he was at the pawn shop when Jane Doe was attacked. He has not shown how the
14 evidence at issue would have benefitted him further, other than by way of speculation.
15

16 The state court's rejection of this claim was not contrary to or an unreasonable
17 application of clearly established federal law. Accordingly, this claim for habeas corpus relief is
18 denied.

19 11. Ineffective Assistance of Appellate Counsel

20 a. Background

21 Petitioner claims that appellate counsel was ineffective because he failed to file a writ in
22 conjunction with the appeal to raise issues and grounds not on the record. None of the claims
23 raised in Petitioner's federal habeas corpus petition were raised by counsel on appeal. However,
24 they were raised by Petitioner in a pro se state habeas petition that was addressed by the court of
25 appeal in conjunction with the appeal. The court ruled:
26

27 Defendant's self-submitted petition claims various denials of due process couched
28 in nine "grounds" plus a final ground of ineffective assistance of counsel for not

1 raising these issues in the appeal briefing. Having reviewed the petition and
2 found no prima facie case for relief stated, we deny it without need to order an
3 evidentiary hearing. [Citation omitted.]

4 Exhibit G at 10.

5 b. Applicable Federal Law

6 The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant
7 the effective assistance of counsel on his first appeal as of right. See Evitts v. Lucey, 469 U.S.
8 387, 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed
9 according to the standard set out in Strickland. Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir.
10 1989). A petitioner therefore must show that counsel's performance fell below an objective
11 standard of reasonableness and that there is a reasonable probability that, but for counsel's
12 unprofessional errors, he would have prevailed on appeal. Id. at 1434 & n.9 (citing Strickland,
13 466 U.S. at 688, 694).

14 Appellate counsel does not have a constitutional duty to raise every non-frivolous issue
15 requested by a defendant. See Jones v. Barnes, 463 U.S. 745, 751-54 (1983); Gerlaugh v.
16 Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997). The weeding out of weaker issues is widely
17 recognized as one of the hallmarks of effective appellate advocacy. See Miller, 882 F.2d at 1434.
18 Appellate counsel therefore frequently will remain above an objective standard of competence
19 and have caused his client no prejudice for the same reason – because the issue he declined to
20 raise was weak. See id.

21 c. Analysis

22 Petitioner's argument that appellate counsel failed to raise crucial issues on appeal is
23 grounded on his assertion that he informed counsel "of all relevant matters that occurred outside
24 of the record." Petition at 17. He then reasserts the factual underpinnings of the claims that he
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1 raises in this petition. For the reasons discussed in this order, however, Petitioner's claims are
2 without merit. He therefore cannot show that there is a reasonable probability that, but for
3 counsel's unprofessional errors, he would have prevailed on appeal.
4

5 Petitioner's claim that appellate counsel should have filed a state habeas corpus petition
6 in conjunction with his appeal also does not present a claim for federal relief, because there is no
7 federal constitutional right to counsel on state collateral review. See Coleman v. Thompson, 501
8 U.S. 722, 755-57 (1991). In any event, Petitioner did present his claims by way of his pro se
9 state habeas petition, and they were considered and rejected by the court of appeal.
10

11 The state court's rejection of Petitioner's ineffective assistance of appellate counsel claim
12 was not contrary to, or an unreasonable application of, clearly established federal law.
13 Accordingly, this claim for habeas corpus relief is denied.
14

15 CONCLUSION

16 The Court concludes that Petitioner has failed to show any violation of his federal
17 constitutional rights in the underlying state criminal proceedings. Accordingly, the petition is
18 denied. The Clerk shall enter judgment and close the file.

19 IT IS SO ORDERED.

20 DATED: 11/2/06

21 
22 JEREMY FOGEL
23 United States District Judge
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2 This is to certify that on 11/3/06, a copy of this ruling was
3 mailed to the following:

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